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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

APR 15 2010

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner claims to be a manufacturing business. It seeks to permanently employ the beneficiary as a market research analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is September 15, 2006, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).

The director denied the petition on August 9, 2007. The decision concludes that the job offered does not require an advanced degree professional.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); see also *Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

In order to classify the beneficiary in the requested employment-based preference category, the job offer portion of the labor certification must demonstrate that the job offered requires a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(4).

¹Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

²The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

It is important to note at the outset that the DOL's role in the employment-based immigrant visa process is limited to determining whether there are sufficient U.S. workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is significant that none of the responsibilities assigned to the DOL, nor the remaining regulations implementing these duties at 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or the job offered. Instead, the authority to make this determination rests solely with U.S. Citizenship and Immigration Services (USCIS). See *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

The job offer portion of the labor certification is set forth at Part H of ETA Form 9089. The labor certification states that the offered position has the following requirements:

- H.4. Education: Bachelor's degree in a "General" field of study³
- H.5. Training: None required
- H.6. Experience in job offered: 60 months
- H.7. Acceptable alternate field of study: None
- H.8. Acceptable alternate combination of education and experience: None
- H.9. Foreign educational equivalent acceptable: Yes
- H.10. Acceptable experience in an alternate occupation: N/A
- H.14. Specific skills or other requirements: None

At issue in this case is whether the job offer portion of the labor certification demonstrates that the job requires a member of the professions as required by 8 C.F.R. § 204.5(k)(4). If the labor certification does not require a professional, the petition must be denied.

The regulation at 8 C.F.R. § 204.5(k)(2), defines "profession" as:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Section 101(a)(32) of the Act states that the term "profession" "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The offered position is not one of the occupations listed at Section 101(a)(32) of the Act. Therefore, in the instant case, the analysis of whether the offered position requires a member of the professions is based on whether a baccalaureate degree is the minimum requirement for entry into the occupation; and if a degree is required, whether that degree must be in a specific field of study in order to qualify for the profession.

³This is interpreted by the AAO as requiring a bachelor's degree in any field of study.

The director acknowledged these definitions, but then relied on *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky*, 12 I&N Dec. 66 (Reg'l. Comm'r. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin*, 11 I&N Dec. at 688, the District Director did state that a degree in and of itself was insufficient; rather, the "knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor." The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky*, 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Further, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, the definition of "profession" in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation, takes precedence over the two cases cited in the director's decision.

Although the definition of "profession" at 8 C.F.R. § 204.5(k)(2) does not explicitly state that the labor certification must require a field of study that relates to the occupation, the regulation provides that a profession is an occupation for which a baccalaureate degree is the *minimum* requirement for entry into the occupation. Thus, some professions may require more than a baccalaureate in an unspecified field for entry into that particular profession. In cases where the labor certification does not require a field of study related to the occupation of the offered position, USCIS is justified in considering whether the labor certification can truly be considered to require a member of the professions.⁴

The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification application form. O*NET is the current occupational classification system used by the DOL. O*NET, located online at <http://online.onetcenter.org>, is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.⁵

In the instant case, the DOL categorized the offered position under the SOC code 19-3021, Market Research Analysts. The O*NET online database states that this occupation falls within Job Zone Four,⁶ and that 82% of individuals in this occupation hold a baccalaureate degree or higher.⁷

⁴It is noted that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *Matter of Shah*, 17 I&N Dec. 244, 246-47 (Reg'l. Comm'r. 1977).

⁵See <http://www.bls.gov/soc/socguide.htm>. For older labor certifications that were assigned a Dictionary of Occupational Titles (DOT) code instead of an O*NET-SOC code, the O*NET website contains a crosswalk that translates DOT codes into the current O*NET-SOC codes. See <http://online.onetcenter.org/crosswalk/DOT>.

⁶According to O*NET, most of the occupations in Job Zone Four require a four-year bachelor's

The corresponding entry in the Occupational Outlook Handbook (OOH) for SOC code 19-3021.00 is Market and Survey Researchers.⁸ The required education for this occupation is summarized as follows:⁹

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for technical positions.

In addition to completing *courses* in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science *courses*, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, *courses* in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

(Emphasis added). In summary, O*NET and the OOH confirm that the offered position requires at least a bachelor's degree. In addition, the OOH states that a master's degree may be required in certain circumstances. The OOH lists relevant courses to prepare for the occupation, and states that a master's degree in a specific field is helpful, but is not required for entry into the profession.¹⁰ Therefore, it is concluded that the occupation of market research analyst does not require an individual to possess a degree in one or more specific fields of study.¹¹

degree. <http://online.onetcenter.org/help/online/zones>.

⁷Details Report for 19-3021.00 at <http://online.onetcenter.org/link/details/19-3021.00> (accessed March 22, 2010).

⁸The OOH, located at <http://www.bls.gov/OCO>, is a nationally recognized source of career information published by the DOL's Bureau of Labor Statistics.

⁹<http://www.bls.gov/oco/ocos013.htm> (accessed March 22, 2010).

¹⁰The regulation at 8 C.F.R. § 204.5(k)(4) states that the labor certification must require a member of the professions *with an advanced degree*. Although the OOH states that entry into the occupation of Market and Survey Researchers does not generally require a master's degree, the *labor certification* in the instant case requires a bachelor's degree and five years of experience, which is equivalent to an advanced degree. 8 C.F.R. § 204.5(k)(2). Accordingly, since the labor certification requires an advanced degree, the petition satisfies the requirements of 8 C.F.R. § 204.5(k)(4).

¹¹It is noted that the director did not reference a source of information suggesting that a minimum of

Further, it is noted that, after obtaining a bachelor's degree in Portuguese from Universidade Federal do Espirito Santo, the beneficiary accumulated extensive marketing experience prior to the priority date. The labor certification, signed by the beneficiary under penalty of perjury, states that the beneficiary has been employed as a marketing professional for over 20 years. The labor certification states that the beneficiary has held the following positions: [REDACTED]

[REDACTED] since July 1, 2003; [REDACTED] with the petitioner from April 1, 2003 until July 1, 2003; [REDACTED] from April 1, 2000 to March 31, 2003; [REDACTED] from January 1, 1990 until March 31, 2000; [REDACTED] from March 1, 1988 until December 31, 1989; and [REDACTED]

[REDACTED] from February 1, 1980 to March 31, 1988. The record contains letters from the beneficiary's previous employers, which document over five years of progressive experience in the specialty. The beneficiary's experience is consistent with the requirements of the occupation as set forth in the OOH.

In light of the above, the petitioner has established that the offered position is a profession.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained, and the petition is approved.